

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. N-06/08-251
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families substantiating a report that the petitioner sexually abused a child. The issues are whether the Department's decision is supported by a preponderance of the evidence and by the pertinent statutory definition of sexual abuse.

The following findings of fact are based on the testimony and other evidence admitted at and after the hearing in this matter held on September 26, 2008. The petitioner appeared *pro se* at the hearing.

FINDINGS OF FACT

1. On or about May 5, 2006 the Department received a report from the mother of a five-year-old girl that her daughter had told her that the petitioner had engaged in certain sexual acts with her. At the time, the petitioner was residing in a house shared with other individuals, including the girl's father.

2. The girl's mother testified at the hearing that on May 4, 2006 she had gone to pick up her daughter after a visitation with the girl's father. The mother stated that her daughter was unusually sullen and withdrawn after the visitation.

3. The mother testified that later the same evening her daughter had blurted out that the petitioner (whom she called "Ho-Ho") had asked her to take down her pants, and that when she refused he had exposed himself and had rubbed his "privates" against her "privates", and that he had held her hands while rubbing himself "up and down" against them.

4. The mother stated that after reporting the incident to the Department she had obtained a restraining order against the petitioner, which the petitioner had not appeared in court to contest.

5. On May 8, 2006 the mother brought her daughter to the Department's district office to be interviewed about the incident. The interviews were videotaped and observed by others through one way glass. The first interview was with a male Department employee and a male state police detective. The girl interacted openly and appropriately with these individuals in casual conversation, but she became completely

unresponsive when they attempted to discuss any aspect of the alleged incident with her.

6. The girl was then interviewed alone by a female Department supervisor, and she immediately became more relaxed and responsive. She identified the petitioner as "Ho-Ho", and that he "lives with Daddy". She told the interviewer that the petitioner had "put his privates on my privates" when her clothes were on, and that he had then exposed himself and asked her to touch him. When she refused, he had held her hands and "helped me touch it" before she was able to pull her hands away from him.

7. The interviewer did not use leading questions, and on the videotape the girl's responses did not seem rote or rehearsed. It was clear that by "privates" the girl was referring to her vagina and the petitioner's penis. The girl's responses to the interviewer were unambiguous in detail and entirely consistent with what her mother had reported a few days earlier.

8. The state police detective who had first tried to interview the girl testified at the hearing that he had also interviewed the petitioner during the course of his investigation of the incident. He testified that the petitioner did not directly deny the details of the girl's

report of the incident, but would not directly admit that it had occurred. According to the detective, when he pressed the petitioner as to why he would not admit it the petitioner stated that he was concerned about what the girl's father would think of him and about his fear of going to jail.

9. In his testimony at the hearing the petitioner did deny the girl's allegations. However, he admitted that for a time he had been alone with the girl in his bedroom on the day in question, where the girl had been playing video games on his bed.

10. The petitioner also testified that he had been abused when he was a child, and that some years earlier he had been convicted of at least one other sexual offense, after which he had undergone therapy. He stated that through therapy he had learned his "boundaries" when he is around children. However, he admitted that some months earlier he had reported to the girl's father that he had "accidentally" touched the girl on her vagina while he was tickling her.

11. The only explanation offered by the petitioner as to why the girl would report such an incident was his allegation that the mother may have been looking for a reason to keep the girl from visiting with her father. However, the girl's father testified at the hearing that he believes his daughter

and her mother. He further testified that the petitioner and his daughter had been alone in the petitioner's bedroom on the day in question when he (the father) had gone outside for several minutes.

12. The child, who is now seven, appeared as a witness at the hearing. By consent of the parties she was questioned alone by the hearing officer using questions submitted by the parties in advance. The testimony took place in a room where the hearing officer and the girl could be heard and observed by the parties through one way glass.

13. The hearing officer's examination of the girl was in many ways similar to the interview of her that had been attempted two years before by the state police officer and the male Department employee (see *supra*). The girl was bright, pleasant and responsive in general, but became completely uncommunicative when asked any questions about the incident. She did testify, however, that she still remembered the incident in question and that the allegations she had made about "Ho-Ho" two years before had been truthful. Nothing in her demeanor leads the hearing officer to doubt the truthfulness and accuracy of her earlier reports regarding the incident in question.

14. At the hearing the hearing officer closely observed the demeanor of the petitioner as well as that of the alleged victim and her mother and father. The petitioner not only appeared nervous and unconvincing when testifying about the incident in question, he also appeared to be vague and evasive in discussing the history and details of his admitted legal and treatment history regarding sexual issues with children.

15. Both the girl's parents appeared to be credible and unvindictive. Nothing in either of their demeanors suggests that they had any role or interest in concocting or embellishing their daughter's reported version of the incident.

ORDER

The Department's decision substantiating the report of sexual abuse is affirmed.

REASONS

The Department is required to investigate reports of child abuse or neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or neglect. 33 V.S.A. § 4913 and 4916. A report is substantiated when it is "based

upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

Any person against whom a report of abuse is substantiated by DCF may appeal to the Human Services Board. In such cases the burden of proof is on the Department. 33 V.S.A. § 4916b.

The statutory sections relied upon by DCF in this matter include the following:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

In this case, there is no question that the acts described by the alleged victim, if they occurred, constituted sexual abuse by the petitioner within the meaning of the above provisions. However, in a *de novo* hearing the Department's burden of proof is to establish the facts by a preponderance of evidence. In determining whether this burden is met, the relative credibility of the witnesses is crucial, especially when, as here, the Department's case is based largely upon hearsay evidence.

Under Vermont Rule of Evidence (VRE) 804a (see Fair Hearing Rule No. 1000.30[5]), the following criteria must be met before hearsay statements of a young child are allowed as evidence; (1) the child is the putative victim, (2) the child is available to testify, (3) the statements were not taken to prepare for a legal proceeding, and (4) the time, content, and circumstances of the statements provide substantial indicia of their trustworthiness. In this case, the child/putative victim was available to testify and did testify at the fair hearing, and neither the reported nor her recorded prior statements were taken in preparation of a legal proceeding. Thus, the key question is the trustworthiness of her prior statements.

Elements of trustworthiness can include disclosure to trusted and reliable adults in an unpressured setting, consistency when the alleged victim describes what occurred, sufficient details, and corroboration by other evidence. In Re M.B., 158 Vt. 63 (1992); State v. Labounty, 168 Vt. 129 (1998); Fair Hearing 21,194. As noted above, all of the above elements weigh heavily in the Department's favor in this matter. In contrast, the hearing officer deemed much of the petitioner's testimony to be lacking in credibility. Thus, the evidence in question is deemed not only admissible but also highly convincing. Therefore, the Department's decision substantiating the report in question as one of sexual abuse must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

#